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Ralf-Christian Schlothauer

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EXAMINER

GWARTNEY, ELIZABETH A

ART UNIT

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1781

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DELIVERY MODE

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### ATTACHMENT TO ADVISORY

Applicants' amendment to the claims filed on 10 November 2010 has been fully considered but is denied entry because the amendment raises new issues that would require further search given that such limitations were never previously presented in the claims (i.e. new claims 39-43).

The examiner notes that *if* the amendment was entered, the rejections under 35 U.S.C. §112, 2nd paragraph would be withdrawn, however; Claims 1-3, 6-12, 16-28 and 30 would still be found unpatentable over Perry et al. ("Effect of Exopolysaccharide-Producing Cultures on Moisture Retention in Low Fat Mozzarella Cheese"), Claims 14 and 32 unpatentable over Perry et al. in view of Degeest et al. (Exopolysaccharide (EPS) biosynthesis by *Lactobacillus sakei* 0-1:production kinetics, enzyme activities and EPS yields"), Claims 15 and 31 unpatentable over Perry et al. in view of Tallgren et al. ("Exopolysaccharide-Producing Bacteria from Sugar Beets"), and Claim 37 unpatentable over Degeest et al.

Applicant submits that "[n]owhere in Perry is the *Streptococcus thermophilus* strain V3 taught or suggested." Applicants find that Perry does not teach or suggest the specific strains described in claim 1. Applicants argue that "Perry does not teach or suggest a composition suitable for forming a low fat cheese, the composition including a starter culture and an exopolysaccharide (EPS) fermentation culture wherein the EPS culture contains a viable lactic acid microorganism selected from the group that includes *Streptococcus thermophilus* V3, *Lactococcus lactis* ssp *cremoris* 322, *Lactobacillus sakei* 570 and *Leuconostoc mesenteroides* 808, wherein the lactic acid microorganism is capable of producing an enzyme, and wherein the enzyme is capable of producing an EPS.

Art Unit: 1781

In this case, Perry et al. teach a starter culture composition for making a low-fat cheese comprising lactic acid bacterium that are capable of producing an exopolysaccharide (EPS) (Abstract, p. 799/Introduction/paragraph 3). Given Perry et al. disclose *Streptococcus thermophilus*, since *Streptococcus thermophilus* strains are known to produce EPS, absent evidence to the contrary, it follows that the *Streptococcus thermophilus* MR-1C strain disclosed by Perry et al. and *Streptococcus thermophilus* V3 could be used interchangeably.

Whether evidence shows unexpected results is a question of fact and the party asserting unexpected results has the burden of proving that the results are unexpected. *In re Geisler*, 116 F.3d 1465, 1469-70, 43 USPQ2d 1362, 1364-5 (Fed. Cir. 1997). The Applicants have failed to meet their burden.

While Applicants' show that each of the specific strains recited in the claims can change the rate of acidification by the starter culture, there is no evidence in the record that shows that other viable lactic acid microorganism capable of producing an EPS, as disclosed by Perry et al., would not also have this property. It is not clear if the ability to change the rate of acidification by the starter culture is a result of the specific strain or the type of bacterium, i.e. lactic acid bacteria capable of producing EPS.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ELIZABETH GWARTNEY whose telephone number is (571)270-3874. The examiner can normally be reached on M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1781

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. G./

Examiner, Art Unit 1781

/Keith D. Hendricks/

Supervisory Patent Examiner, Art Unit 1781